offer to make enhancements to EBI that support maintenance and repair in advance of industry standards includes a 12-month completion target (which may not even apply in the Ameritech states and in Connecticut), but there are no penalties for failure to meet this target. See id. ¶ 13. The proposed process for establishing either a software solution for business rules or uniform business rules does not even begin until the completion of Phase 2 of the process for establishing uniform OSS interfaces (which is likely to be about a year and a half after the merger is closed). See id. ¶ 14.a. Once begun, the process is almost identical to the process proposed for uniform interfaces, and therefore offers the same opportunities for delay. While the offer to negotiate with CLECs a uniform change management process includes a target date of 12 months after the merger closes, SBC/Ameritech has every incentive to undermine the success of the negotiations and to delay any subsequent arbitration process as long as possible. See id. ¶ 15. The commitment to provide access to loop pre-qualification databases for purposes of xDSL and other advanced services includes no penalties for failure to meet the commitment. See id. ¶ 16.a. Finally, the procedures proposed for developing and deploying regionwide OSS upgrades for advanced services are again very similar to those proposed for regionwide interfaces, and offer the same virtually endless opportunities for delay. See id. ¶ 16.c.

As Sprint has exhaustively demonstrated in this proceeding, SBC's and Ameritech's incentive to prevent or degrade (e.g., through delay) CLEC access to essential inputs such as OSS would be greatly increased by the merger. Short of prohibiting the merger, the next best way to blunt SBC/Ameritech's inefficient incentives is to make completion of appropriate OSS upgrades a condition precedent to the merger closing. This would give SBC/Ameritech the incentive to cooperate that is essential for successful OSS upgrades. Furthermore, in all cases, financial penalties for failure to meet target dates must be paid for each business day during which an upgrade has not been satisfactorily performed. Thus, if SBC/Ameritech notifies the Bureau that it has completed an upgrade on a target date and the Bureau subsequently determines that the upgrade had not been satisfactorily accomplished, the financial penalties should apply from the first business day after the target date to the last business day before SBC/Ameritech complies with the Bureau's order to fix identified problems (subject to any relevant caps on penalties). This is the only way for financial penalties to affect SBC/Ameritech's incentives for delay.

In considering the proposal, the Commission must also keep in mind that the changes necessary to implement uniform OSS, while very much needed, impose significant costs upon CLECs. Sprint along with other CLECs will be forced to incur substantial costs to change its processes and rework

development costs already incurred in order to meet new interfaces and standards. In light of these costs, Sprint believes the following additional obligations should attach here:

- Current interface versions should be maintained for at least one to two years after all merger considerations have been satisfied.
- SBC must clearly identify all external CLEC business rule impacts to fully disclose to CLECs any potential gaps. For example, is SBC only consolidating EDI transaction of interfaces and not providing consolidation of the detailed data element business rule usage?
- SBC must outline all categories of products/services order activities, line activities, account activities, pre-order activities, documentation handbooks, and connectivity requirements that will be uniform for all business rules. There are many general statements in respect to business rules being combined, but no specifics on what that encompasses.
- Because the phased implementation approach leads to an unstable environment unless code is restricted, CLECs must have additional assurances in this area. CLECs are at risk of SBC continually imposing or issuing additional requirements from enhancements or dot releases. Therefore, the latest code must be made available for an

interim period of time in order to protect current customers.

- SBC should include a statement on specific testing arrangements and criteria established for each testing stage. A merger of a system on paper is not the reality until extensive testing is conducted. CLECs should not have to migrate to any release until thorough testing has been completed and successfully documented.

Third, the procedures proposed by SBC/Ameritech for resolving OSS-related disputes are quite obviously designed to favor SBC/Ameritech and to reduce the likelihood of decisions that would promote competition. At virtually every stage of the proposed procedures, SBC/Ameritech, the only entity with the incentive to prevent the successful implementation of functioning OSS, can control the terms of the debate by defining the manner in which issues are framed and considered. For example, in each case where arbitration is made available, SBC/Ameritech and only SBC/Ameritech has the authority to submit unresolved issues to the Chief of the Common Carrier Bureau. See id. ¶¶ 11.b, 11.c, 14.a, 14.b, 15, 16.c(2), & 16.c(3). This of course allows SBC/Ameritech to characterize disputed issues in a way that is favorable to its positions. Indeed, the proposed conditions deny CLECs any opportunity to explain to the Common Carrier Bureau Chief why the SBC/Ameritech plan in question is inadequate and how it must be fixed.

Incredibly, the Bureau Chief can then only reach a decision on the merits in favor of SBC/Ameritech. Where the Bureau Chief concludes that (even based on SBC/Ameritech's characterization of the matter) the CLECs' argument is superior on the merits, the Bureau Chief must submit the matter to binding arbitration. SBC/Ameritech then gets another chance to make its arguments, this time with a less informed arbiter. Under SBC/Ameritech's proposal, the Common Carrier Bureau does not even have the authority to fix mistakes made by the arbitrator, since the arbitration is binding and opportunity for appeal in such cases is extremely limited.

Of course, mistakes are very likely to be made since the independent third party arbitrator is to be advised by subject matter experts selected from a list of three firms provided by SBC/Ameritech that may include Telcordia Technologies. SBC/Ameritech will choose subject matter experts that are most likely to be institutionally sympathetic to a BOC. Moreover, the nature of such advice is critical under SBC/Ameritech's proposal because AAA third party arbitrators, unlike the Common Carrier Bureau, would likely be unfamiliar with the critical details of OSS. The arbitrator(s) will be forced to rely heavily on the subject matter experts. It is obvious therefore that allowing SBC/Ameritech to choose the list of possible experts offers the BOC another way of ensuring that the OSS modifications

can be designed in the way that benefits SBC/Ameritech, rather than competition.

As is no doubt evident to the Commission, the only way to ensure reliable and fair resolution of OSS-related disputes is for the Commission to select a third party expert to review SBC/Ameritech's upgrade plans and then to test the upgrades once made. Similar third party testing in New York and elsewhere has proven indispensable in identifying OSS deficiencies. Furthermore, CLECs must be given an opportunity to review and comment on SBC/Ameritech's plans and upgrades as well as the third party expert's studies. As noted, this is the approach adopted in the most effective state Section 271 proceedings and it should be effective in the similar context of the OSS upgrades at issue here.

Furthermore, the Bureau itself must make all substantive decisions regarding the adequacy of SBC/Ameritech's plans and upgrades. SBC/Ameritech has suggested arbitration because it is likely to be easier for the BOC to hide deficiencies in its OSS from an arbitrator or panel of arbitrators that lack the requisite subject matter expertise and that are institutionally reluctant to take firm action. The review of OSS upgrades is a function that expert administrative agencies are uniquely qualified to perform. To leave this issue to an arbitrator with little or no background, advised by "experts" handpicked by SBC/Ameritech, whose decisions are essentially unreviewable

by the Commission is patently unreasonable. To suggest that CLECs pay for half the expense of such proceedings only highlights the cynicism underlying SBC/Ameritech's proposed conditions.

Moreover, delegating disputes to binding arbitration conducted by a third party arbitrator in the manner proposed by SBC is unlawful. SBC here would have the Commission transfer its statutory responsibilities to private parties, without opportunity for subsequent adequate review by the Commission. As the D.C. Circuit has recently held, "when Congress has specifically vested an agency with the authority to administer a statute, it may not shift that responsibility to a private actor."[36] That the Commission has been charged with the authority to administer Sections 214 and 310(d) is undeniable.[37] Shifting that

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[36] Perot v. Federal Election Comm'n, 97 F.3d 553, 559 (D.C. Cir. 1996), cert. denied, 520 U.S. 1210 (1997); see also Population Inst. v. McPherson, 797 F.2d 1062, 1072 (D.C. Cir. 1986) ("Where Congress or the Executive vouchsafes part of its authority to an administrative agency, it is for the agency and the agency alone to exercise that authority"); National Ass'n of Reg. Util. Comm'rs v. FCC, 737 F.2d 1095, 1143 (D.C. Cir. 1984) (holding that the FCC "cannot, of course, cede to private parties such as the exchange carriers either the right to decide contests between themselves and their opponents or even the opportunity to narrow the margins of the debate . . . ").

[37] For example, Section 214 of the Communications Act prohibits the acquisition of any line until the Commission issues a certificate of public convenience and necessity. 47 U.S.C. § 214(a). The Commission may issue the certificate, refuse to issue the certificate, or may issue it for part of the acquisition proposed by the application. Id. § 214(c). The Act permits the Commission to "attach to the issuance of the certificate such terms and conditions as

responsibility to a private actor, especially where the delegation involves a quasi-judicial function, is not permissible. It is hornbook law that an administrative agency must carry out its own quasi-judicial functions.[38] The Commission has essentially no role in the dispute resolution process proposed by SBC/Ameritech. The proposal must therefore be rejected as unlawful and contrary to the public interest.

Finally, SBC offers CLECs a "waiver" of OSS charges for a period of three years. Proposal ¶ 18. But since SBC will not have implemented adequate OSS over this period, its willingness to "waive" changes for degraded service is hardly any sacrifice. Further, its reservation to recover development costs should reflect a requirement to recover any such costs on a competitively neutral basis. Cf. Telephone Number Portability, Third Report & Order, 13 FCC Rcd. 11701, ¶ 35 (rel. May 12, 1998) ("by requiring the Commission to ensure that all telecommunication carriers bear on a competitively neutral basis the costs of providing

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in its judgment the public convenience and necessity may require." Id. (emphasis added).

[38] See 2 Am.Jur.2d, Administrative Law § 74 (1994) ("Merely administrative and ministerial functions may be delegated to assistants whose employment is authorized, but there is generally no authorization to delegate acts discretionary or quasi-judicial in nature."); Krug v. Lincoln Nat'l Life Ins. Co., 245 F.2d 848, 853 (5th Cir. 1957) ("It is more or less elementary that . . . an administrative body cannot delegate quasi-judicial functions . . . .").

number portability, Section 251(e)(2) seeks to prevent those costs from themselves undermining competition").

Sprint's Proposed Language:

"SBC-Ameritech must demonstrate that each of its ILECs provides uniform OSS interfaces for carriers purchasing interconnection. Such interfaces must be uniform throughout the joint SBC/Ameritech region and must include, where applicable, all industry standards (including OBF guidelines), both GUI and EDI based interfaces where no industry standard applies, and uniformity among all related formats, including data fields and business rules.

Each of the ILECs must demonstrate through an independent, third-party test that its OSS interfaces are capable of handling the reasonably expected demands for pre-ordering, ordering, provisioning, billing, repair and maintenance with respect to resold services, unbundled network elements, and combinations of unbundled elements. The testing shall follow the New York PSC independent testing format, as set forth in Case 97-C-0271. Prior to closing, the parties shall submit for the Commission's approval the model contract(s) providing for such testing in each state in the SBC/Ameritech region in accordance with this condition."

H. Performance Measurements

The SBC/Ameritech proposal includes a set of performance measures purportedly "based upon those developed in the Texas collaborative process." Proposal, Att. A ¶ 3.

The simple but obvious question must be asked: why not use the Texas plan itself? The unfortunate but equally obvious answer is that SBC preferred to water down the Texas requirements and, in doing so, has rendered them useless. Sprint will not here explicate each and every aspect of the proposed performance measurements. Suffice it to identify some of the more egregious departures from the Texas plan. It should also be apparent that the Commission should simply utilize the readily available plans, either Texas, California, or LCUG 7.0 in lieu of the mockery that has been put forth by the Applicants.

As the Commission has already recognized, performance measurements should encompass all essential OSS categories including pre-order, ordering and provisioning, maintenance and repair, network performance, unbundled network elements, operator services and directory assistance, system performance, service center availability and billing. See Performance Measurements and Reporting Requirements for Operational Support Systems, Interconnection, and Operator Services and Directory Assistance, CC Dkt. No. 98-56, Notice of Proposed Rulemaking, ¶¶ 43-103 (rel. Apr. 17, 1998). Moreover, such measures should have common nationwide definitions and calculation methodologies. See NARUC Convention Floor Resolution No. 5, "Operations Support Systems Performance Standards" (Nov. 11, 1997). Consistent national measurements will allow this Commission and other state commissions to easily monitor results across state

boundaries to ensure non-discriminatory treatment. In addition, nationally defined measurements and methodologies will minimize the costs to both ILECs and CLECs of developing the necessary performance monitoring processes and mechanisms.

While the FCC and state commissions work to implement a comprehensive set of standards, the Commission here has the opportunity to at least ensure that the SBC/Ameritech region has a single set of measurements and reporting requirements. As Sprint has shown, the big footprint of the merged entity gives SBC/Ameritech increased incentive and ability to discriminate against competitors, making regulatory monitoring of potentially discriminatory OSS and interconnection provisioning all the more critical.

Measurement standards should be based upon actual SBC/Ameritech support provided to its retail operations, retail analogs or any affiliated companies. In those instances where directly comparative results do not exist, standard levels of performance should be established based upon performance studies. This will ensure performance levels necessary to give CLECs a meaningful opportunity to compete. The measures employed must demonstrate to the Commission that non-discriminatory access is being delivered across all interfaces and a broad range of resold services and unbundled elements. The measures must also address availability, timeliness of execution, and accuracy of execution. It is important to note that such parity

considerations will change from month to month and over time, as normal process improvements drive positive change in the levels of support afforded CLECs, and service improves to all end users. There may also be instances where ILEC performance falls short of existing state commission-mandated quality of service standards. In this case, the measurement objectives and methodologies should require that each function be performed equal to the state commission's standards. The SBC proposal falls woefully short of these principles. For example:

- The SBC proposal reduces the number of measurements to twenty. Twenty performance measurements can hardly cover the complexity of performance measurements to the point that CLECs can be assured of parity. The Texas collaborative process, which yielded 122 measurements, stands in sharp contrast. The latter process, as discussed above, was a product of thorough negotiation by the participants, and reflects a sound compromise among the private competing interests and the public interest in competition. It is illogical to assume that anything less than all 122 performance measurements would provide CLECs with the ability to ensure non-discriminatory treatment from the Applicants.[39]

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[39] Indeed, because SBC is already obligated to develop the appropriate support systems to measure and report the 122 measures, the incremental costs of implementing these measures regionwide should be minimal.

- The measures that are listed contain crucial exclusions that will render the measurements even less useful. For example, the very first measurement, "Percent Firm Order Confirmations Returned," expressly excludes rejected orders (manual or electronic). This of course artificially masks poor OSS performance by the ILEC.
- SBC has failed to identify the precise manner in which it is planning to report OSS and other services provided to its affiliates, leaving it instead to a vague and slippery reference in paragraph 37 "to the extent that such Performance Measures are applicable." Proposal ¶ 37. Further such reports will be "on a proprietary basis" and therefore will not allow third party experts and technicians the opportunity to analyze them. Id.
- The proposed benchmarks will not be employed on a geographically disaggregated basis. Especially in light of the Applicants' insistence that the performance of their own operating companies can be used by the Commission to ameliorate the further loss of benchmark comparisons posed by the merger, meaningful geographic disaggregation must be required.
- The penalty provisions, which at first appear quite muscular, are less than meet the eye. First, the Texas final staff report provides for additional, critical relief if the misconduct reaches the cap within a defined

time frame, specifically, relief for competitors under Section 271:

> 7.5 In the event the aggregate amount of Tier-1 damages and Tier-2 assessments reach the $120 million cap within a year and SWBT continues to deliver non-compliant performance during the same year to any CLEC or all CLECs, the Commission may recommend to the FCC that SWBT should cease offering in-region interLATA services to new customers.

In comparison, SBC's proposal offers a $200 million cap in the first year. But when considered in conjunction with potential state penalties, this cap appears far too little. The cap in Texas is $120 million, as noted above; the cap under consideration in California will be somewhere between $36 million and $120 million. In other words, the sum of the penalty caps for these two states alone will likely exceed the proposed federal $200 million cap.

- The timing of SBC's proposed implementation is also inadequate, especially given the longstanding recognition of the need for such measurements. In some instances, the condition would not obligate implementation until more than a year after closing, and the penalty provisions would not apply until much later than that. Given the ready availability of the state plans in either Texas or California, the requirement to implement and report should occur within 60 days of closing.

Sprint's Proposed Language:

"At least 60 days prior to closing, each ILEC must be in compliance with all reporting, measuring and other requirements set forth in the most current performance measures applicable to SBC in California, as set forth in the Joint Partial Settlement Agreement."

I. Verification of Compliance and Auditing Procedures

SBC's proposal provides for audits in connection with SBC's performance concerning its proposed merger conditions. With respect to the collocation proposals, SBC proposes a single pre-merger "examination engagement" audit resulting in an attestation report, and a single post-merger "examination engagement" audit resulting in a final audit report. Proposal ¶¶ 5-6. With respect to Section VII's separate affiliate requirements, SBC proposes an "agreed upon procedures engagement" audit. Id. ¶ 62.d(1). Finally, with respect to all other conditions, SBC proposes an annual "examination engagement" audit. Id.

While independent audits used properly can be a valuable tool, the Commission should be hesitant to rely on an auditor to monitor SBC's compliance with these proposed conditions -- particularly where SBC (and not the Commission) has crafted the terms and conditions under which the auditor will verify SBC's compliance. Of course, "examination engagement" and "agreed upon procedures" audits are regularly conducted by non-lawyers with respect to

certain stated criteria or procedures.[40] Nevertheless, the requirements agreed to here -- in their current form -- are particularly vague and complex, and, Sprint would submit, ultimately meaningless. At their most favorable, they provide enormous room for mischief. Audits cannot make up for the grievous shortfalls in the requirements themselves. There is, in a larger sense, nothing to audit.

Even worse, the post-merger collocation compliance audit calls for the auditor to, inter alia, report to the Commission concerning "SBC/Ameritech's compliance or non-compliance with the Commission's collocation rules." Proposal ¶ 6.f. Such a determination of law cannot be delegated, and must be made by the Commission.[41] Auditing

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[40] "In an engagement to examine management's assertion about compliance with specified requirements, the [auditor] seeks to obtain reasonable assurance that management's assertion is fairly stated in all material respects based on established or agreed-upon criteria." American Institute of Certified Public Accountants, Codification of Statements on Auditing Standards, Attestation Standards § 500.30 (1997). An examination engagement often involves sampling and other testing in order to verify the fairness of management's assertion. It, of course, is not conclusive on the ultimate legal determination. "An agreed-upon procedures engagement is one in which a[n auditor] is engaged by a client to issue a report of findings based on specific procedures performed on the subject matter of an assertion. The client engages the [auditor] to assist users in evaluating an assertion as a result of a need or needs of users of the report." Id. § 600.03.

[41] See Separation of Costs of Regulated Telephone Service From Costs of Nonregulated Activities, Report and Order, 2 FCC Rcd. 1298, ¶ 253 (1986) ("[W]e do not believe that the opinion of an independent auditor regarding the ultimate legal conclusion at issue [i.e., whether a cost allocation manual complies with the Commission's

must not be used to displace the Commission's oversight obligations.

And, for good measure, SBC has agreed only to spell out the details of these audits once the merger closes. For example, the post-merger collocation audit will begin with the submission of preliminary requirements two months after the merger closing. Proposal ¶ 6.a. Similarly, the post-closing annual audits commence with a filing of preliminary audit requirements forty-five days after the merger closing, and a filing of a plan for compliance with the proposed merger conditions sixty days after the merger closing. Id. ¶ 62.b, d(1). Even under far better circumstances than those applicable here, it would, in the interim, be impossible for commenting parties or the Commission to determine whether the proposed audits will be beneficial enforcement instruments, or whether after the merger SBC will refuse to craft comprehensive and informative auditing requirements. To the extent the Commission maintains the proposed auditing requirements in some form, however, they must be modified as follows:

First, the Commission must specify generally that all audits, and specifically the post-merger collocation audit, are conducted in compliance with the American Institute of Certified Public Accountants' Codification of Statements on

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requirements] would add significantly to the record for such decision.").

Auditing Standards. In particular, the Commission must ensure that auditors are not permitted to render legal conclusions such as the ultimate conclusion whether SBC is in compliance with the Commission's collocation rules.

Second, the Commission must ensure that any auditor(s) selected are truly disinterested. SBC's proposal permits it to select an auditor (subject to Commission approval) so long as the auditor has not been "instrumental during the past two years in designing substantially all of the systems and processes under review in the audit, viewed as a whole." Proposal ¶¶ 6, 62.d (emphasis added). This is far too permissive, and would permit an auditor to have been quite heavily involved in designing systems and processes, short of "substantially all," that it is now called upon to audit. In order to avoid the appearance of bias -- or worse, actual bias -- the Commission should pattern this independence upon its existing audit requirements for Section 272 affiliates. Specifically, "[i]n making its selection, the [Applicants] shall not engage any independent auditor who has been instrumental during the past two years in designing any of the accounting or reporting systems under review in the [] audit." 47 C.F.R. § 53.211 (emphasis added).

Third, the "Model Collocation Attestation Report" (Proposal, Att. B) ("Model Report") fails to reflect the fact that the proposed conditions require the pre-merger collocation audit to contain a positive opinion that SBC has complied with its proposed condition to modify "the terms

and conditions offered in tariffs and amendments to interconnection agreements." Proposal ¶ 6. While the proposed condition requires the audit report to contain such an opinion, the Model Report itself does not contain the necessary language. Id. ¶ 5; Model Report. The Model Report must be modified accordingly.

Fourth, though 47 C.F.R. Part 53 specifies that the Commission shall have authority to make adjustments to any preliminary audit requirements with respect to a Section 272 affiliate, 47 C.F.R. § 53.211(b), SBC's post-merger annual audits' proposal explicitly removes that authority from the Commission. Proposal ¶ 62.d(1). The Commission must clarify that any audits at a minimum must be consistent with the Commission's existing Section 272 auditing requirements absent a compelling showing by SBC to justify such a departure.

Finally, SBC proposes to appoint an unidentified corporate officer to, inter alia, oversee SBC's implementation of and compliance with the proposal. Id. ¶ 62.a. Due to the importance of any adopted conditions to the entire industry, it is important that SBC appoint someone with the requisite seniority, experience, and accountability. Specifically, Sprint suggests that the Commission require SBC to designate one or several of the seniormost in-house attorneys for this internal oversight position.

J. Noncompliance Penalties

As with most of the other conditions, the Applicants' commitment to pay hefty fines for noncompliance is riddled with loopholes.[42] For example, various provisions of the proposal allow the parties, often under the guise of dispute resolution, to avoid compliance for long periods of time without triggering the penalty provisions.[43] Another potential area of abuse is the ability of the Applicants to request a discretionary extension of any deadline by the Commission simply "upon a request and showing." Proposal ¶ 67. What precisely must be "shown" to gain an extension is not clear. Nor are other carriers able to contest the propriety of the Commission extending a deadline, even if it harms that carrier.

The Applicants also preserve their right to argue that noncompliance was due to a "force majeure event or an Act of God" -- a legal term that may be generally understood but is not expressly defined by the proposal. Id. ¶ 65. To the extent that the Commission allows such an exception, it should clarify that a "force majeure event" is limited

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[42] Ironically, SBC recently agreed to make a similar "voluntary contribution" of $1.3 million to the U.S. Treasury for its failure to comply with Section 272's requirements following the SBC/SNET merger. See SBC Communications Inc., Order and accompanying Consent Decree (rel. June 28, 1999). Clearly, SBC's post-merger behavior in that case calls into question the deterrent effect of such "contributions."

[43] See supra pages 42-48 (discussing slippage of OSS penalty triggers).

strictly to failures that are due to fire, war, flood, or other national or public disaster, and should also require SBC/Ameritech to take commercially reasonable steps to mitigate the effects of such causes, where applicable.

Perhaps more troubling than the Applicants' ability to avoid incurring penalties on a piecemeal basis while delaying entry into their markets is the potential for them in the future to challenge the Commission's authority to enforce these "voluntary" payments.[44] For example, it is not clear that the Commission has the authority to dictate that any noncompliance payments be placed into a "fund to provide telecommunications services to underserved areas, groups, or persons," as required by the proposal. Proposal ¶ 61.d. As the Commission has recognized, "[u]nless an agency is specifically authorized by statute to retain outside monies it receives, such monies must be deposited in the Treasury as 'miscellaneous receipts.'"[45] While the

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[44] Such a challenge is not unheard of. SBC challenged the constitutionality of the Act's "special provisions" in spite of the fact that its counsel had earlier assured Congress that the Bill of Attainder Clause did not prohibit it from enacting legislation that would substitute equal or less burdensome restrictions for those contained in the AT&T Consent Decree. Telecommunication Policy Act, pt. 1: Hearings before the Subcomm. on Communications and Finance of the House Comm. on Energy and Commerce Concerning the Telecommunications Act of 1990, 101st Cong. 416 (1990).

[45] Assessment and Collection of Charges for FCC Proprietary Remote Software Packages, On-Line Communications Service Charges, and Bidder's Information Packages in Connection With Auctionable Services, Notice of Proposed Rulemaking, 10 FCC Rcd. 7066, ¶ 8 (1995) (citing 31 U.S.C. § 3302(b)); see also Export-Import Bank, 1997 U.S. Comp. Gen.

proposal states that any public interest fund shall be established by the appropriate state commission ("if said state commission(s) accept such role"), and thus the problem may not arise in that context, in the event that such a fund has not been established, the proposal requires that "payment shall be made to a public interest fund designated by the Commission." Proposal ¶ 61.e. Under the latter scenario, SBC could in the future challenge its obligation to make such payments, arguing that the FCC lacks the authority to deposit the monies into any separate fund for the public interest, regardless of how the payments are characterized.

Moreover, the Applicants are careful to note that the proposed payments "are far beyond what the Commission could require under the enforcement provisions of the Communications Act." July Letter at 5. Further, the proposal asserts that the payments are voluntary and disavows that they constitute "penalties, forfeitures or fines." Proposal ¶ 63. Nonetheless, the fact that the Applicants characterize such payments as "voluntary" does not inoculate them from future challenge. To the extent

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LEXIS 107, *4-*5 (1997) (agency may not credit to appropriation voluntary payments received from outside sources absent statutory authority); Federal Emergency Management Agency--Disposition of Monetary Award Under False Claims Act, 1990 U.S. Comp. Gen. LEXIS 426, *3-*5 (1990) (same); Donor Payments To Internal Revenue Service For Employee Meeting Attendance Costs, 1976 U.S. Comp. Gen. LEXIS 88, *2-*3, *5 (1976) (same).

that the Commission actually imposes a substantial penalty that exceeds the usual "cost of doing business" fine, it may well find itself defending its authority to do so.

K. Section 271's Public Interest Inquiry

The Applicants attempt to prejudge and proscribe the scope of the Commission's public interest inquiry under Section 271. Specifically, the proposal prohibits the Commission from "consider[ing] the possible expiration of any of the above Conditions . . . to be a factor that would render the requested [Section 271] authorization inconsistent with the public interest, convenience, and necessity." Id. ¶ 70. This provision would vitiate the Commission's express authority -- indeed, responsibilities -- and is thus impermissible.

Prior to allowing a BOC to provide in-region, interLATA services, Congress requires the Commission to find that the BOC's application is "consistent with the public interest, convenience, and necessity." 47 U.S.C. § 271(d)(3)(C). This standard accords the FCC broad powers to act as an "overseer" and "guardian" of the public interest,[46] and

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[46] See FCC v. WNCN Listeners Guild, 450 U.S. 582, 593 (1981) (the public interest serves as "a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy") (citation omitted); see also National Broad. Co. v. United States, 319 U.S. 190, 217, 219 (1943) (holding that "public interest" confers broad powers upon the FCC); accord Public Utils. Comm'n of Cal. v. FERC, 900 F.2d 269, 281 (D.C. Cir. 1990) ("public interest" standard grants broad powers to FERC in "those areas in which the agency fairly may be said to have expertise") (citation omitted).

provides the FCC with the flexibility necessary to effectuate the complex conditions that will allow for local telephone competition. The proposal, by precluding an inquiry into the status of the proposed conditions, would allow the Applicants to limit the scope of the FCC's analysis under this standard. Such a restriction cannot be reconciled with Congress's mandate in the 1996 Act, the Commission's authority under Title II, or existing case law interpreting the scope of the public interest standard. Indeed, the Commission recently rejected attempts to clarify its public interest inquiry, finding that "it is better to address how a BOC meets the public interest test in Section 271(d)(3)(c) in the context of an actual BOC application for in-region interLATA relief pursuant to Section 271 of the Act, based on the record presented in that application." Petition for Declaratory Rulings on the Realistic Choice Standard for Implementing the Public Interest Test of the Communications Act of 1934, CCB Pol No. 98-4, Order ¶ 2 (rel. July 9, 1999). Similarly, the Commission must reject the Applicants' attempts to constrain the scope of the Commission's Section 271 public interest inquiry in this proceeding.

III. CONCLUSION

For all of the foregoing reasons, the SBC proposal is demonstrably anticompetitive. It cannot even begin to serve as a basis upon which to consider the pending merger. The Commission should reject the proposal in its entirety.

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